In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1011

BERNARD HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in an indictment returned in the Southern District of New York with conspiracy to sell unregistered securities, *i.e.*, the capital stock of American Equities Corporation, and to employ a fraudulent scheme to sell those securities in violation of 15 U.S.C. 77e, 77q, and 77x. He was convicted after a trial without a jury and was sentenced to imprisonment for a period of one year and a day[1] (Pet. 2).

Petitioner has raised two challenges to his conviction: first, whether the evidence was sufficient to show

[1] Four other defendants were charged as conspirators with petitioner. Benjamin, Mende, and Reiss were convicted, and Kovalesk was acquitted. Petitioner alone seeks review here.

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that petitioner knowingly participated in a conspiracy to sell unregistered securities and fraudulently to sell these securities; and second, whether petitioner was properly found to be a party to certain telephone conversations. Petitioner's contention as to the sufficiency of the evidence is shown by the opinion of the court below (328 F. 2d 854; Pet. App. 1–22) to be completely without merit.

As to the telephone conversations, the relevant facts are that around February 11, 1961, Robert Drattel, a broker, received a copy of the December financial statement prepared by petitioner. A day or two later, he called petitioner's telephone number and asked for petitioner. The voice at the other end of the telephone identified himself as petitioner. In response to Drattel's question, the other party replied that he had seen the books and records of the American Equities Corporation. Drattel also wanted to know when a certified balance sheet would be available. In the conversation Drattel was given another telephone number belonging to petitioner. Drattel later called this second number, which petitioner admits belonged to him, and talked to a party who had the same voice as the party to the earlier conversation and who again identified himself as petitioner. Later, the same voice called Drattel for a further conversation (Tr. 685–691; G.A. 124).

Petitioner's contention that he was not properly identified as the other party to these conversations is clearly without merit. The circumstance that a person identifying himself as petitioner answered when two different phone numbers belonging to petitioner were

dialed, coupled with the fact that he was able to discuss an auditor's report prepared by petitioner, constituted a sufficient foundation upon which the trial judge could conclude that petitioner was a party to the conversation. See *Van Riper* v. *United States*, 13 F. 2d 961, 968 (C.A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U.S. 702; *Cwach* v. *United States*, 212 F. 2d 520, 525 (C.A. 8).[2]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1964.

[2] *Washington* v. *United States*, 357 U.S. 348, which is relied upon by petitioner, is not in point. In that case, this Court reversed a narcotics conviction because of the insufficiency of the evidence where the evidence connecting the petitioner to the narcotics was a brief telephone conversation overheard by agents. The agents testified that the defendant was the other party to the conversation on the basis of hearing his voice the next day when they arrested him. Both parties to the conversation and the defendant's brother testified that the brother, and not the defendant, was the other party. 253 F. 2d 913 (C.A. 7).

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